Supreme Court, U.S.
FILED
MAY 11 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1658

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1989

LOUISBURG GRAIN CO., INC.,
A. SCOTT ANDERSON
AND E. SYLVIA ANDERSON, Petitioners,

v.

CITY OF ARKANSAS CITY, KANSAS, CITY OF HESSTON, KANSAS, AND SOUTHWEST NATIONAL BANK, WICHITA, KANSAS, Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Kansas Supreme Court was given the opportunity to rule upon petitioner's constitutional claims?

2. Whether the Kansas Supreme Court, when presented with "overwhelming" evidence of a fraudulent conveyance, may reverse a trial court's finding that a fraudulent conveyance did not occur?

LIST OF PARTIES AND RULE 28.1 LIST

In addition to the list of parties contained in petitioners' Petition for Writ of Certiorari, respondents City of Arkansas City, Kansas, City of Hesston, Kansas and Southwest National Bank, Wichita, Kansas state that the respondents City of Arkansas City, Kansas and City of Hesston, Kansas are municipalities incorporated under the laws of the State of Kansas and have no parent companies, subsidiaries or affiliates. Respondent Southwest National Bank, Wichita, Kansas has no parent companies, subsidiaries or affiliates.

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STATEMENT OF THE CASE

Respondents City of Arkansas City, City of Hesston and Southwest National Bank ("respondents") brought this action against A. Scott Anderson, E. Sylvia Anderson, Louisburg Grain Company, Inc. and K-M Land Company to set aside the Andersons' fraudulent conveyance of real estate to the two corporations, which were wholly owned by the Andersons. The District Court of Johnson County, Kansas, found that although many elements of the fraudulent conveyance had been established, that the intent of the Andersons in conveying the property was "unknown." Based upon this conclusion, the trial court entered judgment in favor of the Andersons and their corporations.

Respondents appealed the trial court's decision to the Kansas Court of Appeals, which affirmed the trial court, with one of three judges dissenting. Thereafter, the Kansas Supreme Court accepted review of the Court of Appeals Decision and found that "overwhelming" evidence before the Court established that the Andersons conveyed property to their two corporations with the intent to hinder, delay or defraud respondents. In reaching this decision, the Kansas Supreme Court was presented with and considered the entire record which had been presented to the trial court.

Thereafter, the Andersons, K-M Land Company and Louisburg Grain Company, Inc. filed a Motion for Rehearing and Reconsideration with the

Kansas Supreme Court. As part of that motion, the Andersons and the two corporations requested the Kansas Supreme Court to reconsider its decision based upon the following arguments: (1) An "improper scope of review" was used; and (2) the evidence supported the trial court's findings. Conspicuously absent from the Motion for Rehearing was any reference to the constitutional issues now presented to this court.

The Kansas Supreme Court properly denied the Motion for Rehearing. The Andersons and Louisburg Grain Company, Inc. ("petitioners") have now petitioned this court for a Writ of Certiorari, contending that the Kansas Supreme Court's decision violated Due Process.

REASONS WHY PETITION SHOULD BE DENIED

This case presents the general issue of whether the Kansas Supreme Court, when faced with "overwhelming evidence" of fraud may hold, as a matter of law, that a trial court's decision to the contrary should be reversed.

Petitioners frame their objection to the Kansas Supreme Court's decision in constitutional terms, but these objections are merely a subterfuge to conceal their dismay regarding the Kansas Supreme Court's decision on the merits. Perhaps this concealment is best illustrated by the fact that the constitutional issues raised in the Petition were <u>never</u> presented to, nor ruled upon by, the Kansas Supreme Court.

Indeed, the Kansas Supreme Court was presented with all of the evidence presented to the trial court and found that the trial court's decision as a matter of law was not supported by substantial competent evidence. Petitioners have not produced additional facts warranting a re-examination of this issue.

For these reasons, as more fully explained below, respondents request the Petition for Certiorari be denied.

1. Petitioners may not raise constitutional issues in a Petition for Writ of Certiorari which were not presented to the Kansas Supreme Court for determination.

In their Petition for Writ of Certiorari, petitioners suggest to

this Court that they requested the Kansas Supreme Court to rehear and/or reconsider its decision based upon the Fifth and Fourteenth Amendments of the United States Constitution. Significantly, petitioners' due process claims under the Fifth Amendment are wholly without foundation because the Fifth Amendment applies only to the relationship between the federal government and the individual. San Francisco Arts & Athletics, Inc. v. United States Olympic Committee, 483 U.S. ____, 107 S.Ct. 2971, 2984, n. 21, 97 L.Ed. 2d 427 (1987).

A close reading of petitioner's Motion for Rehearing and Reconsideration reveals that the due process claims were not presented to

the Kansas Supreme Court for determination. Indeed, the petitioners' Motion fails even to mention the Fifth Amendment, the Fourteenth Amendment or the concept of Due Process. Accordingly, the Kansas Supreme Court was not given the opportunity to rule on the constitutional issues now raised in this Petition for Writ of Certiorari.

It has been long established that issues not raised or resolved in the lower court may not first be presented to this court in a Petition for Writ of Certiorari. Patrick v. Burget, 486 U.S. _____, 108 S.Ct. 1658, 100 L.Ed. 2d 83, 91, n. 5 (1988); Youakim v. Miller, 425 U.S. 231, 234, 96 S.Ct. 1399, 47 L.Ed. 2d 701 (1976) (per curiam). Petitioners have advanced no

reason why they should be excused from this rule, and respondents submit that the Petition should be denied for the petitioners' failure to comply therewith.

2. The Kansas Supreme Court acted properly in considering all of the evidence presented to it in determining that "overwhelming evidence" establishes that petitioners conveyed property with the intent to defraud respondents.

The Kansas Supreme Court was presented with the entire evidentiary record previously presented to the trial court. Based upon the entire evidentiary record, the Kansas Supreme Court found, as a matter of law, that the trial court was presented with "overwhelming evidence" of fraud and

that the trial court's findings to the contrary were not supported by substantial competent evidence. City of Arkansas City v. Anderson, 243 Kan. 627, 638, 762 P.2d 183 (1988).

As to petitioners' Due Process claims, it is well established that the Kansas Supreme Court has the power to consider such issues not raised by the parties where such consideration is necessary to serve the ends of justice. State v. Puckett, 230 Kan. 596, 600-601, 640 P.2d 1198 (1982). Petitioners' only complaint is that they were not granted leave to file a brief regarding this issue. Notably, petitioners do not specify what additional facts they could have presented to the Kansas Supreme Court to cause it to find, as a matter of

law, that the evidence supported the trial court's decision. Nor do they suggest that the evidence does not overwhelmingly establish fraud. Petitioners' failure to mention these matters is not surprising, because, all of the facts relating to the fraud issue were presented to the Kansas Supreme Court.

Without unduly burdening this Court with an extensive repetition of all of the facts supporting the Kansas Supreme Court's determination, respondents invite this Court's attention to the following undisputed facts:

1. The Andersons were the owners and sole stockholders of Louisburg Grain Company, Inc. City of Arkansas City v. Anderson, 243 Kan. 627, 635, 762 P.2d 183 (1988).

2. Louisburg Grain Company, Inc. had knowledge of litigation against the Andersons. City of Arkansas City, 243 Kan. at 635.

3. The Andersons were insolvent at the time they transferred the property to Louisburg Grain Company, Inc. City of Arkansas City, 243 Kan. at 635-636.

4. Louisburg Grain Company, Inc. had knowledge that the property transferred to it was the last substantial non-exempt asset owned by the Andersons. City of Arkansas City, 243 Kan. at 636-637.

5. There was no evidence that the Andersons received any consideration for the conveyance to Louisburg Grain Company, Inc. City of Arkansas City, 243 Kan. at 637.

6. The effect of the conveyance was to place, improperly, the Andersons' property out of the reach of their creditors. City of Arkansas City, 243 Kan. at 637-638.

What additional facts and circumstances do petitioners assert to challenge these findings? None. The Kansas Supreme Court, presented with the entire record, determined as a matter of law that the evidence was insufficient to support the trial court's findings. Indeed, the Kansas Supreme Court determined the quantity of evidence establishing fraud to be overwhelming. Petitioners' generalized constitutional challenge to this determination fails to present a certworthy claim.

CONCLUSION

For the above reasons, respondents City of Arkansas City, City of Hesston and Southwest National Bank respectfully ask that the Petition for Writ of Certiorari be denied.

May, 1989 Respectfully submitted,

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